(6) (7)

Office-Supreme Court, U.S.
FILED
JUL 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1555 AND No. 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND COMPANY, INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION; JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,
Appellees.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF OF APPELLANT WOODWARD SAND COMPANY, INC.

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QUESTION PRESENTED

By requiring the payment of "withdrawal liability" to a multiemployer pension trust from an employer who has no further obligation to the pension trust, does the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1453 (1982), take the property of the employer for the use of the pension trust in violation of the Taking Clause of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The list of all parties to the proceeding before the Three Judge Court of the United States District Court for the Central District of California is as follows:

John L. Connolly, C.V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H. Seymour, Richard L. Corbit, Harold Edwards, Donald E. Mier, William C. Waggoner, Richard Gannon, and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, plaintiffs; Pension Benefit Guaranty Corporation, a nonprofit corporation established within the Department of Labor of the United States of America, defendant; Woodward Sand Company, Inc. ("Woodward Sand"), Penfield & Smith, Inc. ("Penfield & Smith"), Roy L. Klema Engineers, Inc. ("Klema Engineers") (improperly named as Klema Engineering, Inc.), and Municipal Engineers, Inc. ("Municipal Engineers"), plaintiffs-in-intervention.

Penfield & Smith, Klema Engineers, and Municipal Engineers are not parties to this appeal, and are designated as appellees under Supreme Court Rule 10.4, 28 U.S.C. app. at 442 (1982). Penfield & Smith, Klema Engineers, and Municipal Engineers are not joining in the appeal by Woodward Sand because the Trustees have now agreed that, as a result of a recent statutory change in the effective date of the Multiemployer Pension Plan Amendments Act of 1980, these three employers have incurred no liability under the statute.

Woodward Sand also does business as Woodward Sand and Materials Company, and as Woodward Organic Products Company.

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BRIEF OF APPELLANT WOODWARD SAND COMPANY, INC.

OPINION BELOW

The Three Judge Court of the United States District Court for the Central District of California filed its Order Granting Summary Judgment to Defendant on May 1, 1984. The Order is not officially reported, and is reproduced in the Joint Appendix ("Jt. App.") at 104.[1]

JURISDICTION

The Three Judge Court of the United States District Court for the Central District of California filed its Order Granting Summary Judgment to Defendant on May 1, 1984. Jt. App. at 104. The Order, *inter alia*, rejected Woodward Sand's contention that the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1453 (1982) ("MPPAA") effected a taking in violation of the Taking Clause of the Fifth Amendment to the United States Constitution, and denied a permanent injunction against enforcement of MPPAA. The Three Judge Court entered its judgment on the Order on December 4, 1984. Jt. App. at 119. Woodward Sand filed its Notice of Appeal on January 31, 1985, Jt. App. at 122, and its Jurisdictional Statement on April 1, 1985. This Court noted probable jurisdiction on June 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The portion of the Fifth Amendment at issue in this appeal is as follows:

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[1] Other earlier opinions below that predate Woodward Sand's involvement in this case are discussed in the Trustees' Jurisdictional Statement in Case No. 84-1555 at 2-3.

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The statutory provisions challenged by Woodward Sand are contained in the Multiemployer Pension Plan Amendments Act of 1980, which enacted Part 1, Subtitle E, Title IV of the Employee Retirement Income Security Act of 1974, 94 Stat. 1208 (codified at 29 U.S.C. §§ 1381-1453 (1982)). The essential provisions are as follows:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a).

> When an employer withdraws from a multiemployer plan, the plan's sponsor, in accordance with this part, shall--
>
> > (1) determine the amount of the employer's withdrawal liability,
> >
> > (2) notify the employer of the amount of the withdrawal liability, and
> >
> > (3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1382.

STATEMENT OF THE CASE

Woodward Sand is a California employer engaged in the building materials supply business. Until 1980, Woodward Sand was a member of a multiemployer bargaining group that negotiated and was signatory to collective bargaining agreements with the International Union of Operating Engineers, Local Union No. 12 ("Local 12"). As part of such collective bargaining agreements, Woodward Sand agreed to contribute to the Operating Engineers Pension Trust ("Pension Trust") a negotiated amount per hour worked by each employee, and to abide by the terms of the incorporated Pension Trust Agreement ("Trust Agreement") which had been executed by certain employers and Local 12 in 1960, and which provided for the creation and funding of the Pension Trust. Jt. App. at 63-64, 69-70, 90. R. at Docket No. 128, Exh. 7, p. 180.

As with all multiemployer pension trusts established after passage of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 136 (codified as amended at U.S.C. §§ 141 - 187 (1982)), the Pension Trust was established consistent with the requirements of sections 302(a) and (c) of the LMRA. Section 302(a) broadly prohibits payments by an employer "to any representative of any of his employees," but section 302(c) excepts employer contributions to a pension trust if certain conditions are met. These conditions include requirements that: (1) the pension trust be established "for the sole and exclusive benefit of the employees" and certain beneficiaries; (2) "the detailed basis on which such payments are to be made be specified in a written agreement with the employer"; and (3) "employers and employees be equally represented in the administration of such fund."[2]

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[2] A fuller text of these portions of sections 302(a) and (c) of the LMRA, 29 U.S.C. § 186(a), (c), is as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the

(Footnote 2 continued on page 5)

Although section 302(c)(5) requires that the employer contributors in a multiemployer pension trust must appoint one-half of the trustees, the section's additional requirement that the pension trust be established "for the sole and exclusive benefit of the employees" ensures that the trustees are totally independent of the employers (and union) that selected them, and are to be fiduciaries acting exclusively in the interest of the pension trust's participants and beneficiaries.[3]

(Footnote 2 continued)

> interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce . . . .
>
> . . .
>
> (c) The provisions of this section shall not be applicable . . .
>
> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund . . .; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . . .

[3] *Accord, National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 331-32 (1981).

Within the framework set up by section 302 of the LMRA, the Trust Agreement includes a number of provisions, common in multiemployer pension trusts established under the LMRA, which effectively provide as follows:

1. The Trustees have the exclusive right to set or change benefits.

2. The Trustees are not to grant benefits which cannot be adequately funded.

3. The sole source of funding of benefits is the corpus of the Pension Trust.

4. The employers' obligation to contribute to the Pension Trust is completed when the set contribution amount agreed to in the collective bargaining agreement is paid, even if the contributions are insufficient to pay the vested benefits allowed by the Trustees.[4]

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[4] Relevant provisions of the Trust Agreement, as set forth in the Pension Trust's First Amended Complaint, Jt. App. at 62, are as follows:

> Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employer or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations

(Footnote 4 continued on page 7)

In this setting, Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829 (codified as

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(Footnote 4 continued)

> of such Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements.

Art. II, Sec. 7.

> This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments.

Art. VII, Sec. 4.

> This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has

(Footnote 4 continued on page 8)

amended at 29 U.S.C. §§ 1001-1381 (1982)). Title IV of ERISA created an insurance program, administered by the Pension Benefit Guaranty Corporation ("PGGC"), intended to provide benefits to the participants in certain "defined benefit" pension trusts that terminated with insufficient assets to cover their guaranteed benefits. 29 U.S.C. § 1302.[5] The PBGC was given discretionary authority to pay benefits upon the termination of multiemployer pension trusts, 29 U.S.C. § 1381(c)(2)-(4), and employers who had contributed to a "defined benefit" multiemployer pension trust were subject only to a contingent liability. If a multiemployer pension trust terminated, and if the PBGC chose to pay the guaranteed benefits, employers who had contributed to the pension trust during the preceding five years were required to reimburse the PBGC in proportion to their contributions, but in no event more than 30% of each employer's net worth. 29 U.S.C. §§ 1362(b)(2), 1364.

Notwithstanding the fact that under the Trust Agreement and applicable collective bargaining agreements contributing employers only promised a set contribution, not a set benefit level, the PBGC ruled in 1975 that the Pension Trust was a "defined benefit plan," not a "defined contribution plan," and that the Pension Trust therefore fell under the PBGC's regulatory jurisdic-

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(Footnote 4 continued)

> assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan.

Art. VIII, Sec. 2.

[5] ERISA defines a "defined benefit plan" to be any plan that is not a defined contribution plan. 29 U.S.C. § 1002(35). ERISA defines a "defined contribution plan" as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenes, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

tion and was liable to the PBGC for payment of insurance premiums. Jt. App. at 21. The Trustees subsequently filed this action against the PBGC on June 17, 1975, seeking in part declaratory and injunctive relief for violation by the PBGC of the Taking and Due Process Clauses of the Fifth Amendment.[6] Jt. App. at 1.

In early 1980, Woodward Sand timely sent Local 12 notice of its termination of the then current collective bargaining agreement and notice of its intention to negotiate with Local 12 separately and directly, independent of the multiemployer bargaining group. Woodward Sand and Local 12 reached impasse in the negotiations in September of 1980 (although this date is in dispute). Because section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), prohibits an employer from making, and a pension trust from accepting, further contributions once impasse is reached, Woodward Sand ceased making such contributions to the Pension Trust. Woodward Sand paid all contributions and satisfied all obligations required by the Trust Agreement for the time before impasse was declared, and it could no longer contribute to the Pension Trust.

On September 26, 1980, MPPAA took effect, radically altering the contractual underpinnings and the legal relationship between employers and pension trusts. MPPAA requires that upon an employer's "withdrawal" from a pension trust, the trustees calculate the amount of the pension trust's total unfunded vested benefits,[7] allocate a portion thereof to the "withdrawing

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[6] The extensive subsequent procedural history of this case, occurring before Woodward Sand intervened, is set forth in the Trustees' Jurisdictional Statement in Case No. 84-1555 at 7-8.

[7] Unfunded vested benefit liability is the difference between the value of the pension trust's assets and its vested benefit liability. 29 U.S.C. § 1393(c). The term "vested benefits" refers to the actuarial present cash value of (1) expected future benefits due to all plan participants currently receiving benefits plus (2) expected future nonforfeitable benefits due to all active and terminated participants who are not currently receiving benefits. 29 U.S.C. § 1002(25). The term

(Footnote 7 continued on page 10)

employer," and demand payment of that amount as "withdrawal liability." Thus, despite specific contractual provisions among contributing employers and a pension trust strictly limiting the amount of employer contributions to the amounts set forth in the collective bargaining agreement, and despite full compliance with those provisions by the employers, MPPAA requires a "withdrawing" employer to contribute substantial additional sums to the pension trust to make up for unfunded vested benefits at benefit levels set solely by the trustees.

MPPAA places no limit on the amount of withdrawal liability to be collected from an employer, and authorizes a pension trust to collect payment from an employer even if the liability exceeds the net worth of the employer.[8] In accordance with MPPAA's requirements, the Pension Trust has demanded from Woodward Sand payment of a substantial sum for withdrawal liability.

By direction of the Ninth Circuit, the district court in this case requested that a Three Judge Court be convened on June 21, 1982, to adjudicate the constitutional challenges and request for injunctive relief originally raised by the Trustees. Jt. App. at 61. Because MPPAA was enacted during the course of this action, the Trustees filed an amended complaint challenging MPPAA as well. Jt. App. at 62. Woodward Sand sought leave to intervene, which was granted by an Order filed on December 15, 1982. Jt. App. at 82. Woodward Sand subsequently filed a complaint in intervention on February 10, 1983. Jt. App. at 88.

(Footnote 7 continued)

"nonforfeitable" in this context signifies the unconditional, legally enforceable right to receive benefits provided by the pension trust. 29 U.S.C. § 1002(19). Whether a benefit is "vested" or "forfeitable" will depend on the provisions of the pension plan, or overriding provisions of ERISA, as amended.

[8] This, in fact, was the case with Klema Engineers, one of the plaintiffs-in-intervention below. The Pension Trust demanded payment of withdrawal liability in an amount representing approximately seven times Klema Engineers' net worth. R. at Docket No. 128, Exh. 4, p. 100.

The complaint in intervention seeks a declaration, *inter alia*, that MPPAA violates the Fifth Amendment by taking the property of withdrawn employers for the use and benefit of the Pension Trust without just compensation. The complaint in intervention also seeks a permanent injunction against the enforcement of MPPAA.

The Trustees and Woodward Sand filed motions for summary judgment on May 13 and 16, 1983, respectively. By order filed on May 1, 1984, the Three Judge Court denied the motions for summary judgment, holding that MPPAA was constitutional on its face and denying injunctive relief. Jt. App. at 104. Regarding the Taking Clause issue, the Three Judge Court concluded that "the contractual right which insulates employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the takings clause," and that therefore it was not necessary to decide whether a taking occurred, whether any such taking was for a private or public purpose, or whether any such taking was with just compensation. Jt. App. at 110-11.

SUMMARY OF ARGUMENT

MPPAA violates the Taking Clause of the Fifth Amendment to the United States Constitution by requiring the uncompensated appropriation of up to all of the assets of employers which have withdrawn from multiemployer pension trusts. The "private property" implicated by the statute is the assets, in whatever form, which are owned, possessed and used by these employers, and which are required by the statute to be liquidated and paid to multiemployer pension trusts upon demand. MPPAA requires this appropriation despite express contractual prohibitions against it. The bundle of rights associated with an employer's entitlement to the assets of its enterprise is precisely the sort of "property" protected by the Taking Clause from uncompensated governmental transfer or destruction. Support for this conclusion is provided

by state law definitions of "property," and by precedent of this Court.

Under MPPAA, the statutorily mandated independent trustees of multiemployer pension trusts are granted the right to define the extent of their own entitlement to employer assets despite the fact that it is they, and not the employers affected, who have exercised complete control over the investment and allocation of employer contributions, and who have independently established benefits at levels which exceed the amounts yielded by the investments they have chosen to make. There is no limit on the amount of the appropriation MPPAA authorizes to be taken from employers. These amounts are allowed to exceed the value of all of the employer's assets.

MPPAA's withdrawal provisions apply to all withdrawing employers: (1) regardless of whether the withdrawal was voluntary or involuntary; (2) regardless of whether it will result in a complete appropriation of an employer's assets; (3) regardless of whether the pension trust is in jeopardy of terminating or failing to pay its benefit levels; (4) regardless of whether the trustees have raised benefit levels for retirees (who could not have worked in reliance on the increased benefit level) as well as active employees; and (5) regardless of whether the particular level of benefits, creating the underfunding, has been promised by the trustees for several years or merely involves benefits which have been recently granted.

All that is required to trigger withdrawal liability is a permanent cessation of the obligation to contribute or permanent cessation of covered operations. An employer who desires to continue contributions to the pension trust will nevertheless be forced to withdraw if, in negotiations with the union, it is unwilling to accede to the union's other collective bargaining demands. Alternatively, an employer can completely or partially withdraw from a plan involuntarily merely because economic circumstances dictate the discontinuation or substantial reduction of the activity of the employer's business. Finally, an employer is forced to withdraw if

its employees vote to decertify the union, even though they are purportedly the persons whom the law is designed to protect.

The effect of MPPAA is the imposition of a nonconsensual servitude upon employers whose private property is permanently impressed into public service without compensation in direct contravention of Taking Clause tenets. However public its purpose or rational its basis, MPPAA cannot be exempted from the constitutional requirement that government pay for a program it desires, rather than taking from a minority, without compensation, in order to fund it.

ARGUMENT

THE ASSETS OF EMPLOYERS CONSTITUTE "PRIVATE PROPERTY" FOR PURPOSES OF THE TAKING CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The threshold issue of whether "private property," as defined for purposes of the Taking Clause, is implicated by MPPAA assumes particular significance in the instant case, where the basis for the Three Judge Court's decision upholding MPPAA against attack on Taking Clause grounds was the Court's conclusion that "no 'property' was involved." Jt. App. at 110. The Court characterized the interest in question as "a mere contractual arrangement," Jt. App. at 110, and disregarded the fact that MPPAA affects far more than contractual rights. The interests implicated by MPPAA are the interests of an employer in the tangible, identifiable assets of its enterprise, whether they be in the form of realty, personalty, trade secrets, or cash in the bank. These are precisely the sort of interests protected under the Fifth Amendment from uncompensated governmental transfer or destruction. Thus, even in the absence of contractual guarantees that no liability would be assessable upon withdrawal, MPPAA's authorization of the uncompensated transfer of all of the assets of

an employer to another entity upon demand of those in control of that entity would constitute a Taking Clause violation.[9]

This Court has long recognized that "not all economic interests are 'property rights'" for Fifth Amendment purposes.[10] The

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[9] There is considerable support, however, for the proposition that the vested, express contractual right of employers to be free from seizure of most or all of their assets constitutes "private property" for Taking Clause purposes. *E.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid"); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding coal company's unexercised contractual right to mine surface coal was "taken" by state statute, and that company was entitled to compensation); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 122-23 (1924) (holding government's expropriation of claimant's contract rights a compensable taking under the Fifth Amendment); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1922) ("[t]he contract [for purchase of large quantity of steel plate] in question was property within the meaning of the Fifth Amendment").

Circuit and district court conclusions to the contrary have without exception been premised upon dicta contained in this Court's opinion in *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982), stating that "our cases recognized, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral." *E.g., Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1406 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1276 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984); *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund*, 578 F. Supp. 1222 (D.D.C. 1984); *Speckmann v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469 (E.D. Mo. 1983). The opinion in *Security Industrial Bank* does *not*, however, state that contractual rights are not "property" for Taking Clause purposes, and it seems unlikely that the Court intended, with this one-sentence pronouncement, to expressly overrule the body of precedent recognizing contractual rights as "property" under the Taking Clause.

[10] *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945) (rejecting utility corporation's claimed "property right" in the high-water level of a navigable river).

interests in question here, however, possess all of the recognized attributes of traditionally protected private property. The physical, tangible assets owned, possessed, and used by an employer in furtherance of his business operation are certainly "sufficiently bound up with the reasonable expectations of [the employer] to constitute 'property' for Fifth Amendment purposes." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978). Such assets, whether in the form of liens, trade secrets, or cash are recognized as property by state law [11] and by opinions of this Court. *E.g., Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2874 (1984)

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[11] The significance of state law definitions of "property" has been repeatedly recognized in takings analyses. *E.g., Ruckelshaus v. Monsanto Co.*, __ U.S. __, 104 S. Ct. 2862, 2872 (1984) (noting the "basic axiom" that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) ("[n]or as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance"). In *Monsanto*, the Court expressly rejected the argument that property rights recognized as such by state law could be "pre-empted" by federal legislation: "*[i]f Congress can 'pre-empt' state property law . . . then the Taking Clause has lost all vitality.*" *Id.* at 2878 (emphasis added). The Court further noted that "a sovereign, 'by ipse dixit, may not transform private property into public property without compensation.' . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* at 2878, *quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

California statutes provide that "[t]he ownership of a thing is the right of one or more persons to *possess* and *use* it *to the exclusion of others*. In this Code, *the thing of which there may be ownership is called property*," and furthermore, "[t]here may be ownership of *all inanimate things which are capable of appropriation* or of manual delivery; . . . *of all obligations*; *of such products of labor or skill as . . . the good-will of a business, trademarks and signs*, and of rights created or granted by statute." Cal. Civ. Code §§ 654, 655 (West 1985) (emphasis added). In *Haldeman v. Haldeman*, 202 Cal. App. 2d 498, 21 Cal. Rptr. 75 (1962), the court expressly recognized that "[a] business is a type of property which is a composite of tangible and intangible properties. Its tangibles will be its fixtures, inventory of supplies and stock in trade, perhaps a building or leasehold, cash on hand, cash in bank, accounts receivable and other personal property. Its intangibles include principally its good will as a going business." *Id.* at 502.

(recognizing a Taking Clause property interest in trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 164 (1980) (expressly stating that, for Taking Clause purposes, "[t]he principal sum deposited in the registry of the Court plainly was private property. . . . The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property"); *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman's lien protected by Taking Clause); *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148 (1953) ("[s]o long as a railroad is not caused by such regulations *to lose money on its over-all business*, it is hard to think that it could successfully charge that its property was being taken for public use 'without just compensation'") (emphasis added); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate lien protected); *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911) (observing, with reference to Oklahoma Act authorizing State Banking Board to levy and collect assessments of one percent of each state bank's average daily deposits for purposes of creating a depositor's guaranty fund, that "there is no denying that by this law, a portion of [the bank's] property might be taken without return").

The assets in question are assignable, can form the res of a trust, and pass to a trustee in bankruptcy. In *Monsanto*, these factors were considered significant to the holding that trade secrets constitute "property" under the Taking Clause. 104 S. Ct. at 2873. The assets may take the form of trade secrets, or may be in the form of money, as was the property in *Webb's Fabulous Pharmacies, B & O Railroad* and *Noble State Bank*, or liens, as in *Armstrong* and *Radford*. Whatever their form, these assets are property, with respect to which their owners exercise "the right to *possess, use* and *dispose* of [them]," *Monsanto*, 104 S. Ct. at 2874, *quoting United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (emphasis added), as well as the right to exclude others from their possession, use, or disposition. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("right to exclude

others" is "one of the most essential sticks in the bundle of rights commonly characterized as property").

The fact that such interests may, under some circumstances, justifiably be infringed upon, diminished in value, or otherwise impaired by government without compensation, as in the case of taxation or restrictions imposed upon designated uses,[12] does not render them any less "property." The question of whether a taking has occurred has consistently been regarded as a wholly separate inquiry from the question of whether the interests at issue constitute "property," *e.g., Monsanto*, 104 S. Ct. at 2872, and is addressed below.

MPPAA AUTHORIZES THE UNCOMPENSATED TAKING OF ALL OF THE ASSETS OF EMPLOYERS UPON DEMAND OF THE TRUSTEES OF PRIVATE PENSION FUNDS IN VIOLATION OF THE TAKING CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

More than half a century ago this Court observed that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Since that time, the Court has repeatedly recognized that "the Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[13]

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[12] *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (city Landmarks Preservation Law restricting construction above landmark site not a taking); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (safety regulation prohibiting excavations below a certain level not a taking).

[13] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980), *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960).

MPPAA epitomizes the sort of "short cut" envisioned and condemned by Mr. Justice Holmes in *Pennsylvania Coal*. In lieu of "paying for the change" desired by requiring the federal government to insure the benefits in question or to raise the revenues required for accomplishment of MPPAA's purportedly public objectives in some other manner, Congress has imposed unreasonable and unanticipated burdens upon those employers "who had in the past been sufficiently enlightened as voluntarily to agree to [contribute to] pension plans for their employees."[14]

MPPAA's effect is the complete destruction of the bundle of rights associated with an employer's entitlement to the assets of his enterprise. MPPAA places all of these assets, in whatever form, at the disposal of pension trust trustees, yet affords no compensation to the employers affected. This system goes far beyond permissible regulation "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), by mandating the imposition of a nonconsensual servitude upon employers who are forced to shoulder a burden more appropriately borne by the public as a whole, in direct contravention of Taking Clause purposes and precepts.[15]

MPPAA eradicates an employer's fundamental contractually-guaranteed right to cease participation in a pension trust without penalty and confronts the employer with the spectre of the seizure of all of the assets of the employer's enterprise to satisfy the congressionally-created "liability" which may be assessed and

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[14] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978).

[15] Any contention that the burden in question must be allocated between withdrawing employers and employers still enrolled in a pension trust misstates the issue. The critical question is whether or not the *public* should pay what is required for achievement of MPPAA's purportedly *public* purpose, or alternatively, whether the system should be restructured to allow contributing employers to control the level of benefits promised, or to limit the discretion of plan trustees to increase benefits to situations in which there are currently sufficient assets in the pension trust to preclude underfunding.

collected regardless of whether the employer's withdrawal is voluntary or involuntary, regardless of whether the result will be the complete appropriation of all of the assets of the employer or just the transfer of a nominal sum, regardless of whether the pension trust is in jeopardy of terminating or is close to fulfilling its benefit levels, and regardless of whether the upward adjustment of the level of benefits creating the underfunding sought to be remedied occurred years earlier, or just the day before.

The characterization of MPPAA's imposition of liability in terms of "withdrawal," a word which implies that the employer is free to choose whether or not to continue contributing to a pension trust, is misleading. All that is required to trigger withdrawal liability is a permanent cessation of the obligation to contribute, or the permanent cessation of covered operations. 29 U.S.C. § 1383(a). For example, if the employees whose pension benefits MPPAA is purportedly designed to protect opt to decertify the union pursuant to the LMRA, 29 U.S.C. § 159(e)(1), the employer's "right" to continue contributions to a multiemployer pension trust will be abruptly terminated. Contributions forwarded to the pension trust will be returned, and the employer, who has no choice in the matter, will be deemed to have "withdrawn." Similarly, a "withdrawal" may occur as a consequence of the inability of an employer and union to resolve an impasse reached in the collective bargaining process regarding other issues, even if the employer desires to continue contributions to the pension trust.[16] Alternatively, an employer's partial or complete "withdrawal" may be an involuntary consequence of economic circumstances which dictate the discontinuation or substantial reduction of activity of the employer's business. 29 U.S.C. §§ 1383(a)(2); 1385(a).

Under MPPAA, the pension trust trustees are authorized to levy an assessment against the employer upon withdrawal. There is no

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[16] A withdrawal does not occur merely because the union and employer have been involved in a labor dispute. 29 U.S.C. § 1398. If the impasse is not ultimately resolved, however, the LMRA expressly prohibits the pension trust from accepting further contributions. 29 U.S.C. § 186(c)(5).

limit to the amount which may be assessed,[17] which depends solely upon the extent to which the pension trust in question is underfunded. MPPAA forces withdrawing employers to make up the deficit, despite the fact that employers have had no voice in the management or allocation of pension trust assets, and have therefore been powerless to challenge the trustees' arbitrary setting of benefit levels in excess of the amounts yielded by the trustees' investment of employer contributions.[18] Thus, *the trustees are given the authority to define their own entitlement to employer assets*. The result is a forced and uncompensated contribution to a pension trust.

The underfunding of vested benefits attributable to a withdrawing employer is calculated without regard to the *time* at which benefits were promised to any of the participants in the pension trust. For example, LMRA trust agreements, such as the subject Trust Agreement, are routinely amended to increase benefit levels of participants who are *already retired* or vested under the pension trust. These benefit increases reflect *no reliance interest on the part of these former employees*, yet they can dramatically increase the amount of unfunded vested benefits of the pension trust. MPPAA imposes the liability for these benefit promises not upon the pension trust trustees, who are in complete control of funding,

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[17] Under ERISA, contributors to a multiemployer fund could in some instances be charged up to 30% of their respective net assets if they had contributed to a pension trust in the five years preceding its termination. 29 U.S.C. § 1362(b)(2), 1364. The constitutionality of MPPAA in no way depends upon the constitutionality of the above-described provision. Even if that measure were deemed to be permissible "regulation," MPPAA, with its authorization of unlimited assessments against withdrawing employers, is an unconstitutional taking of employer rights and assets in violation of the Taking Clause.

[18] "[*T*]*he duty of the management-appointed trustee* of an employee benefit fund under § 302(c)(5) *is directly antithetical to that of an agent of the appointing party*. . . . ERISA essentially codified the strict fiduciary standards that § 302(c)(5) trustee must meet . . . [and] *vest*[*ed*] *the exclusive authority and discretion to manage and control the assets of the plan in the trustees alone, and not the employer* or the union." *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 331-32, 333 (1981) (emphasis added).

but rather upon the withdrawing employer, who has no ability under the LMRA to control the situation.[19] As a consequence, regardless of whether any employees of the employer have relied upon trustee promises of particular benefits, the employer is trapped by MPPAA into a system of nonconsensual servitude from which it cannot escape -- it cannot withdraw from the pension trust because its entire business may be expropriated; yet if it continues in the pension trust, the level of underfunding, over which the employer has no control, may continue to increase.[20]

Such uncompensated expropriation of private property for public service has been held unconstitutional in a variety of

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[19] The trustees of a multiemployer pension trust, for example, may adopt a plan amendment increasing the benefit level for retirees in order to ease the impact of inflation. Such an amendment immediately increases the vested liability of the pension trust because retirees by definition have vested benefits. To the extent that the increase in vested liability is unfunded, ERISA specifies that the unfunded vested liability (termed "unfunded past service liability" in the statute) be amortized over a period of 30 years. 29 U.S.C. § 1082(b)(2)(B)(iii). This in essence provides the trustees with a mechanism for delaying the proper funding of granted benefits, and thus allows, if not encourages, trustees to grant such benefit increases currently on the assumption that they can be paid for gradually over time.

MPPAA, however, requires that an employer pay withdrawal liability in a sum calculated on the basis of the unfunded vested liability as of a given point in time. Thus, for example, if an employer withdrew from a pension trust shortly after the trustees voted to increase substantially the benefit level of retirees (thereby substantially and immediately increasing the pension trust's unfunded vested liability), the employer's withdrawal liability would also dramatically increase--even though the trustees' calculations indicate that the increased unfunded vested liability would actually be paid off over a 30-year period.

[20] Moreover, the calculation of unfunded vested benefits of the pension trust for purposes of determining the employer's withdrawal liability can change dramatically merely because of a change in the actuarial firm used by the pension trust. Actuaries are given broad latitude in calculating the amount of unfunded vested benefits; their computations may be based upon *any* actuarial assumptions which are not, "in the aggregate, unreasonable." 29 U.S.C. § 1401(a)(3)(B). Actuaries thus are not required to calculate the most precise figure for unfunded vested benefits, and MPPAA establishes a presumption in favor of the correctness of the actuarial assumptions relied upon by a pension trust. 29 U.S.C. § 1401(a)(3).

contexts. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state use of landlord property for attachment of cable television lines a compensable taking); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (Florida's appropriation of interest earned on monies deposited with the registry of the court a compensable taking); *United States v. Pewee Coal Co.*, 301 U.S. 114 (1951) (President's seizure and operation of coal mine a compensable taking); *United States v. Causby*, 328 U.S. 256 (1946) (government's use of air space above claimant's land a compensable taking); *Youngstown Sheet & Tube v. Sawyer*, 295 U.S. 476 (1935) (executive's seizure of steel plants a compensable taking); *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871) (military's seizure and use of claimant's steamers a compensable taking); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 135 (1852) (trader forced to remain with army "to insure the success of a distant and hazardous expedition" a compensable taking).[21]

MPPAA's unrestricted authorization of the taking of *all* of an employer's assets for purposes of subsidizing or increasing benefit levels which the employer did not establish, and is powerless to influence or control, is distinguishable from situations in which certain uses of property are prohibited, substantially decreasing its value, but still leaving the owner in possession and control. Under MPPAA, there is nothing to preclude the transfer of the entire equity of an enterprise. For example, the liability asserted against Klema Engineers, a plaintiff-in-intervention in the proceeding below, totalled more than seven times the net worth of the company. R. at Docket No. 128, Exh. 4, p. 100. One court has noted

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[21] It should be noted that takings have frequently been found in contexts in which the property in question has been subject to substantial prior regulation, as in the areas of security interests, *e.g., Armstrong v. United States*, 364 U.S. 40 (1960) (taking of materialman's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (taking of mortgagee rights in property held as security), and mining rights, *e.g., Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). Prior regulation cannot justify subsequent legislation which rises to the level of a taking without just compensation.

that a withdrawal liability claim, "whether valid or not, sends a signal to people in the industry that the company is out of business." *T.I.M.E. - D.C., Inc. v. Trucking Employees of New Jersey Welfare Fund, Inc.*, 560 F. Supp. 294, 304 (E.D.N.Y. 1983).

However rational its basis, or public its purpose, MPPAA unconstitutionally takes private property without compensation. The factors considered in any takings analysis -- the economic impact of the alleged regulation, the extent of its interference with distinct investment-backed expectations, and the character of the government action[22] -- uniformly support this conclusion. The impact -- the permanent transfer of all of the assets of an employer to another private entity -- indisputably "interferes" with the employer's expectation that those assets will remain in its possession, subject only to valid government taxing and regulation, and to the contractual commitments which it chooses to make. The character of the governmental action -- the statutory authorization of the uncompensated transfer of an enterprise's assets to another entity for its use upon demand of the trustees of that entity -- is likewise distinguishable from constitutionally permissible governmental restrictions on specific beneficial uses of private property.

The salutary nature of Congress' desire to secure pension benefits is not disputed. That purportedly public purpose does not, however, insulate MPPAA from the constitutional requirement that property owners whose private property is taken by the government must be compensated for the resulting loss.

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[22] *See Monsanto*, 104 S. Ct. at 2874-75 (1984), and cases cited therein.

CONCLUSION

For the reasons stated above and in Woodward Sand's Jurisdictional Statement, the judgment of the Three Judge Court should be reversed.

Respectfully submitted,

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